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”New Challenges in the Boardroom”: The Seventh Annual Albert A. Destafano Lecture on Corporate, Securities & Financial Law

Albert*

*Becker Ross Sonté & Klein LLP

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LECTURE

THE SEVENTH ANNUAL ALBERT A. DESTEFANO LECTURE ON CORPORATE, SECURITIES & FINANCIAL LAW[†]

PANEL DISCUSSION: “NEW CHALLENGES IN THE BOARDROOM”

WELCOME

William Michael Treanor¹
Fordham University School of Law

OPENING REMARKS

Paul A. Soden²
Thompson Hine, LLP

Jill E. Fisch³
Fordham University School of Law

[†] The panel discussion herein was held at Fordham University School of Law on March 27, 2007, for the Seventh Annual Albert A. DeStefano Lecture on Corporate Securities & Financial Law. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory material in respect of certain statements by the speakers.

1. William Michael Treanor is the Dean and Professor of Law of Fordham University School of Law.

2. Paul A. Soden is a partner in the corporate transactions and securities practice of Thompson Hine LLP.

3. Jill Fisch is the T.J. Maloney Chair in Business Law at Fordham University School of Law and is the Director of the Fordham Center for Corporate, Securities and Financial Law.

MODERATOR

Holly Gregory⁴
Weil, Gotshal & Manges LLP

FEATURED LECTURERS

Robert C. Clark⁵
Harvard University Distinguished Service Professor

Dan Englander⁶
Ursula Capital Partners LP

Hon. Jack B. Jacobs⁷
Delaware Supreme Court

Robert “Kam” Kamerschen⁸
Former Chairman & CEO, ADVO, Inc.

Paul Washington⁹
Time Warner, Inc.

4. Holly Gregory is a partner in the corporate governance practice at Weil, Gotshal & Manges LLP.

5. Robert C. Clark is the Harvard University Distinguished Service Professor and Austin Wakeman Scott Professor of Law. Professor Clark served as Dean of the Faculty of Law at Harvard Law School between 1989-2003.

6. Daniel Englander is the founder and currently the Managing Partner of Ursula Investors.

7. Justice Jacobs serves on the Delaware Supreme Court and serves as Adjunct Professor of Law at the Widener University School of Law.

8. Robert “Kam” Kamerschen is the retired Chairman and CEO of ADVO and currently serves on multiple boards of directors.

9. Paul Washington serves as Senior Vice President, Deputy General Counsel, and Corporate Secretary of Time Warner, Inc. Mr. Washington is also an Adjunct Professor of Law at Fordham University School of Law.

WELCOME

DEAN TREANOR: Welcome, everyone. I'm Bill Treanor. I'm the Dean of Fordham Law School. It's my pleasure to welcome you tonight to the Seventh Annual Albert A. DeStefano Lecture on Corporate, Securities and Financial Law.

This lecture is, year-in and year-out, an incredible moment and a high point in our corporate law program at Fordham Law School, and it is really the gem of our Corporate Law Center.¹⁰

The Corporate Center brings together a lot of Fordham's great initiatives in the business law field. It really has two pegs.

One is we have an outstanding faculty in the business law area. It is one of the top-rated programs in the country.¹¹ We are very pleased this year to be joined by two new outstanding faculty members—Richard Squire,¹² who is here in the first row; and Sean Griffith,¹³ who is here with us in the second row—who are really building on our extraordinary strength in the area. We have great full-time faculty and we have great adjunct faculty. It really is a recipe that is unrivaled in American law schools.

I'd like to acknowledge the people who run the Corporate Center. First of all, Jill Fisch, seated in the first row, who you will be hearing from shortly. Jill is the Director of the Corporate Law Center, the T.J. Maloney Professor of Business Law, an outstanding scholar and teacher, and actually somebody who carried me when we jointly taught a corporate law and history course. So I am always very grateful to her for her expertise in the area. She, with her vision, has really led a great program from the start.

Our Deputy Director is Caroline Gentile,¹⁴ who is in the second

10. For more information, please visit the Fordham Center for Corporate, Securities and Financial Law website, <http://www.fordham.edu/law/faculty/fisch/source.html> (last visited Apr. 5, 2007).

11. See Leiter's Law School Rankings, http://leiterrankings.com/faculty/2003/faculty_businesslaw.shtml (last visited April 25, 2007) (measuring by "Faculty Quality in Specialty Areas").

12. Richard C. Squire is an Associate Professor of Law at Fordham University School of Law.

13. Sean J. Griffith is an Associate Professor of Law at Fordham University School of Law.

14. Caroline Gentile is an Associate Professor of Law at Fordham University School of Law and Deputy Director of the Fordham Center for Corporate, Securities and Financial Law.

row, also an outstanding scholar and teacher, and has devoted so much time and effort to making this the outstanding program that it is.

I would like to also recognize Ann Rakoff,¹⁵ who is the new Executive Director of the program and who makes it run so beautifully.

And finally, before I get off the stage, I would like to acknowledge our alumni, who have played a critical role in the Center from its start and who really have had the vision that makes it happen. In particular, I would like to single out Bob Hollweg,¹⁶ who is in the second row; Dennis Cronin,¹⁷ and Peter Madoff,¹⁸ who have given so much time to the Center and really have helped it flourish in a very short period of time.

I'd also like to recognize the great Chair of the Fordham Corporate Law Center Board of Advisors, Paul Soden, Class of '68, a great corporate and legal leader, who has been selfless in helping us make this a great program.

Paul?

OPENING REMARKS

MR. SODEN: Thank you, Dean Treanor. That was very kind of you.

Good evening and welcome to all of you.

First, I want to thank you all for coming here tonight and spending your time with us for the Seventh DeStefano Lecture on Corporate, Securities and Financial Law. This lecture is part of a series of lectures, roundtables, and conferences of the Fordham Corporate Law Center.

Founded in 2001, the Center serves as the focal point for the Law School's business law programs. The Center sponsors a number of public programs, including the A.A. Sommer Jr. Lecture, tonight's program, and the Murphy Conference on Corporate Law.¹⁹

15. Ann Rakoff is the Executive Director of the Fordham Center for Corporate, Securities and Financial Law.

16. Robert W. Hollweg serves as General Counsel and Secretary at Weight Watchers Int'l, Inc.

17. Dennis Cronin is a founding partner of Cronin & Vris, LLP.

18. Peter B. Madoff is the Senior Managing Director of Bernard L. Madoff Investment Securities LLC.

19. The Eugene P. and Delia S. Murphy Conference on Corporate Law is a bi-annual academic conference featuring scholarly presentations and commentary from both academics and practitioners.

The Sommer Lectures, which focus on SEC matters, have included presentations by Arthur Leavitt,²⁰ Mary Schapiro,²¹ Harvey Goldschmid,²² William McDonough,²³ Richard Ketchum,²⁴ and Margaret Cole,²⁵ Head of Enforcement for the Financial Securities Authority in the United Kingdom.²⁶

The DeStefano Lectures, generally panel discussions, have covered subjects including SEC Regulation FD,²⁷ market regulation,²⁸ and what went wrong at Enron.²⁹ Our last DeStefano program was a presentation by Congressman Michael Oxley,³⁰ co-author of Sarbanes-Oxley.³¹ His presentation was on “Securing the U.S. Economy: Protecting the Investor and our Capital Markets.”

The Roundtables have focused on a number of subjects, like “Corporate Attorneys Post Enron,” and on the Sarbanes-Oxley law, as well as “The Evolving Duty of Good Faith for Corporate Directors.”³²

Academic conferences have provided a forum, for prominent corporate and business law academics from all over the country, to meet and discuss their cutting-edge research in the field of corporate law.

20. The Inaugural A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law, 6 FORDHAM J. CORP. & FIN. L. 259 (2001).

21. The Fourth Annual Albert A. Destefano Lecture on Corporate, Securities & Financial Law, 10 FORDHAM J. CORP. & FIN. L. 167 (2005).

22. The Third Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law, 8 FORDHAM J. CORP. & FIN. L. 335 (2003).

23. The Fourth Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law, 9 FORDHAM J. CORP. & FIN. L. 583 (2004).

24. *See supra* note 21.

25. The Seventh Annual A.A. Sommer, Jr. Lecture on Corporate, Securities & Financial Law, 12 FORDHAM J. CORP. & FIN. L. 259 (2007) [hereinafter Seventh Sommer Lecture].

26. For more information, please visit the Financial Services Authority website, <http://www.fsa.gov.uk> (last visited Apr. 5, 2007).

27. The First Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law, 6 FORDHAM J. CORP. & FIN. L. 273 (2001).

28. The Third Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law, 9 FORDHAM J. CORP. & FIN. L. 301 (2004).

29. The Second Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law, 8 FORDHAM J. CORP. & FIN. L. 1 (2002).

30. Michael Oxley served as a United States Representative from the 4th District of Ohio from 1981-2007.

31. Sarbanes-Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

32. For more information, please visit the Fordham Center for Corporate, Securities and Financial Law website, <http://www.fordham.edu/law/faculty/fisch/priorprograms.html> (last visited Apr. 19, 2007).

Through all these programs, the Center provides a forum for debate on developing business law issues among academics, practitioners, and policymakers. Moreover, it is our hope that the Center's academic setting will enable a dialogue that enjoys independence from client-driven objectives and at the same time takes advantage of academia's traditional reputation for innovation and creativity.

In addition to its other programs, the Center runs an Advanced Business Law Seminar,³³ in which students are introduced to leading business law academics and cutting-edge legal scholarship.

The Center also sponsors the Business Law Practitioner Series³⁴ to introduce students to distinguished practitioners who discuss developments in business law and also answer students' questions.

The Center benefits from the support of a specialized scholarly journal, the *Fordham Journal of Corporate and Financial Law*,³⁵ which has published the presentations of many of the Corporate Center's programs.

The Center is grateful for the generous support of the individuals and institutions listed in the program, which you have. I cannot resist this opportunity to urge all of you to have your names and your firms' names in the program in the future. Indeed, there will be pledge cards at the door.

This, as you can see, is a rich and diverse series of initiatives in the corporate, securities, and financial law area by the Fordham Corporate Law Center. I invite any and all of you who have an interest in the Center's activities to join with us and create more great work in the future.

Tonight's DeStefano program will focus on "New Challenges in the Boardroom."

This program series is dedicated to Al DeStefano,³⁶ a great lawyer,

33. For more information, please visit the Fordham Center for Corporate, Securities and Financial Law website, <http://www.fordham.edu/law/faculty/fisch/advbus2005.html> (last visited Apr. 19, 2007).

34. For a current calendar of events, please visit the Fordham Center for Corporate, Securities and Financial Law website, <http://www.fordham.edu/law/faculty/fisch/calendar.html> (last visited Apr. 19, 2007).

35. For more information, please visit the Fordham Journal of Corporate & Financial Law website, <http://law.fordham.edu/publications/index.ihtml?pubid=600> (last visited Apr. 19, 2007).

36. Albert A. DeStefano was formerly a partner of the law firm Becker Ross Stone & Klein LLP.

great person, and devoted alumnus of Fordham Law School.

These lectures are sponsored by the firm of Becker Ross,³⁷ of which Mr. DeStefano was a partner, and I am pleased to tell you that one of Becker Ross' partners is here tonight, Mr. Howard Justvig.³⁸

The lecture series bearing Al's name has had a most distinguished track record, and moral integrity has been the underlying theme of the DeStefano Lecture. Al is a great example of this sought-after quality. He exemplifies the heart and soul of Fordham Law School.

An evening student over sixty-seven years ago, he started at Fordham Law School in 1939, graduating eight years later first in his class, with his law school attendance interrupted by his service to our country in World War II. As a practitioner for over half a century, he advocated positions, persuaded adversaries to compromise, and negotiated in a frank, straightforward, and transparent manner.

Fordham has always prided itself for its efforts to produce, not only the well-trained and skilled professional, but the well-balanced person as well. Al DeStefano is such a person. For many years, he was a member of the Board of Fellows of the Gallaudet University in Washington, which is the only liberal arts university for the deaf in the world. For over thirty-five years, he served as Secretary and Trustee of the Helen Keller Services for the Blind.³⁹ For over twenty years, he served as a Trustee of the Cleary School for the Deaf.⁴⁰

Through this series of lectures, we hope to remind ourselves of our mission: to produce skilled professionals of character, integrity, and compassion—people like Albert A. DeStefano.

Tonight we are most fortunate in having another great panel for our program. Professor Jill Fisch, the T.J. Maloney Professor of Business Law at Fordham and Director of the Fordham Corporate Law Center, will now introduce this distinguished panel.

PROF. FISCH: Good evening. I'm Jill Fisch. I am the Director of the Fordham Corporate Law Center.

On behalf of Fordham Law School, I too am delighted to welcome

37. For more information on the law firm of Becker Ross Stone & Klein LLP, please visit http://pview.findlaw.com/view/2521320_1?channel=LP (last visited Apr. 19, 2007).

38. Howard Justvig is a partner of the law firm Becker Ross Stone & Klein LLP.

39. For more information, please visit the Helen Keller Services for the Blind website, <http://www.helenkeller.org/> (last visited Apr. 4, 2007).

40. For more information, please visit the Cleary School for the Deaf website, <http://www.clearyschool.org/> (last visited Apr. 4, 2007).

you to the Seventh Annual Albert A. DeStefano Lecture, "New Challenges in the Boardroom."

I'd like to thank our terrific panel, whom I will introduce in a moment, for being here tonight.

I want to thank the firm of Becker Ross for establishing this lecture series named for our distinguished alumnus.

I also want to acknowledge the Center's Board of Advisors, Professor Caroline Gentile, and Executive Director Ann Rakoff for their hard work in putting this program together.

As you know, the Albert A. DeStefano Lecture is one the jewels of Fordham's program in business law. Together with our other programs, which Paul Soden has described, the DeStefano Lecture allows Fordham to bring leaders from the highest levels of corporate and securities to the school. We here at Fordham benefit from their insights.

This Fall, as you heard, we were lucky enough to have Congressman Michael Oxley deliver the 2006 DeStefano Lecture.

We also hosted the Seventh Annual A.A. Sommer, Jr. Lecture and heard from Margaret Cole. Among her other insights, Margaret Cole suggested that the FSA should be following the U.S. model of using criminal prosecutions more frequently to address serious financial misconduct.⁴¹ The comments that Ms. Cole made have been widely reported in the press and her speech is available on the Internet. It will be published in a forthcoming issue of the *Fordham Journal of Corporate & Financial Law*.

And mark your calendars. I'm delighted to advise you—and you probably saw the notices outside—that next Fall the Sommer Lecture will be delivered by SEC Commissioner Paul Atkins.⁴² That date is October 9, 2007.

Incidentally, if you are here for the first time tonight, if you don't know about the Corporate Center or its programs and you'd like to stay involved, please give us your contact information. Drop off a card, sign our sign-in sheet, or send us an email so we can keep you invited to all of our future programs.

Let me turn now to tonight's panel. With such stars, I didn't know where to start, but fortunately they're seated in alphabetical order, so that makes my task easy.

41. See Seventh Sommer Lecture, *supra* note 25, at 279.

42. Paul S. Atkins was appointed by President George W. Bush to be a commissioner of the SEC on July 29, 2002.

Let me start with Dean Clark. Robert C. Clark was the Dean and Royall Professor of Law at Harvard Law School from 1989 through July of 2003. He now serves as the Harvard University Distinguished Service Professor. An authority on corporate law and corporate governance, he has written numerous articles, book chapters, and a very famous one-volume treatise, *Corporate Law*,⁴³ which I have heard described as the paradigm for future student texts.

Professor Clark is a Trustee of TIAA,⁴⁴ the giant pension fund serving the higher education community, and he has chaired the TIAA-CREF Ad Hoc Committee on Corporate Governance. In addition, he serves on the Board of Directors of several companies.

Professor Clark received his undergraduate degree from Maryknoll College, a Ph.D. in Philosophy from Columbia University, and J.D. Magna Cum Laude from Harvard Law School.

Next we have Dan Englander, co-founder of Prescott Capital, which subsequently changed its name to Ursula Capital Partners LP.⁴⁵ Prior to Prescott, Mr. Englander was a Partner and Managing Director at Allen & Company, a New York-based merchant banking firm. Prior to that, he was an analyst with Wertheim Schroder & Company, a New York-based investment banking firm. Prior to that, he was an analyst with the Falconwood Corporation, a private investment firm, which owned, among other things, MovieFone. Mr. Englander currently serves on the Board of Directors for Crème de la Crème, Copart, and America's Car Mart. He graduated from Yale University.

Justice Jack Jacobs was appointed to the Delaware Supreme Court in 2003. Prior to his Supreme Court appointment, he served as Vice Chancellor of the Delaware Court of Chancery since October 1985, after having practiced corporate and business litigation in Wilmington, Delaware since 1968. He has written a number of the classic opinions that the students in this class know and think, quite fondly of.

Justice Jacobs holds an undergraduate degree from the University of Chicago and a law degree from Harvard University. In addition to his judicial activities, he serves as Adjunct Professor of Law at NYU and at the Widener University School of Law. He has participated in a huge number of academic programs related to corporate and securities law, he

43. ROBERT C. CLARK, *CORPORATE LAW* (1986).

44. For more information, please visit the TIAA-CREF website, <http://www.tiaa-cref.org/> (last visited Apr. 4, 2007).

45. Ursula Capital Partners LP is an investment partnership.

has guest lectured at several American and foreign law schools, and he has delivered speeches on corporate law around the world, from Hong Kong, Seoul, Tokyo, to Stockholm and Amsterdam. He has published an impressive number of academic articles on corporate law.⁴⁶ He serves as a member of the Board of Advisers of the Columbia Law School Center of Corporate Governance. And, most important, he is a member of our own Corporate Center Board of Advisors.

Robert “Kam” Kamerschen is the retired Chairman and CEO of ADVO,⁴⁷ Inc., the nation’s largest direct-mail micro-targeting services company, New York Stock Exchange listed, headquartered in Windsor, Connecticut, with annual revenues of over \$1 billion.

He has had over thirty years of executive experience. Prior to joining ADVO, his positions included service as President and Chief Executive Officer of RKO Six Flags Entertainment, for those of you who are fans of Six Flags—I know my kids are—where he managed Wesray Capital Corporation’s equity interest in the amusement park and motion picture businesses. He was also President and Chief Operating Officer of Marketing Corporation of America, and Executive Vice President Office of the Chairman at Norton Simon, Inc.

Kam has served on the Board of Directors of a large number of public companies, too numerous to list here, but we are going to hear in a few minutes a little bit more about his extensive board experience. He also serves on the boards of a number of private equity companies.

He is a Dean’s Associate at Miami University School of Business and he has lectured at a number of leading business schools. He holds a Bachelor of Science and an MBA from Miami University, Ohio.

Paul Washington was named Senior Vice President, Deputy General Counsel, and Corporate Secretary of Time Warner, Inc.,⁴⁸ our neighbor right up the street, in January of 2006. In this position he is

46. See, e.g., William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001); Jack B. Jacobs, *Comments on Contestability*, 54 U. MIAMI L. REV. 847 (2000); Symposium, *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002); Symposium, *The Great Takeover Debate: A Meditation of Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002).

47. For more information, please visit the ADVO website, <http://www.advo.com/> (last visited Apr. 4, 2007).

48. For more information, please visit the Time Warner, Inc. website, <http://www.timewarner.com/corp/> (last visited Apr. 4, 2007).

responsible for working directly with the Board of Directors, serving as the liaison between the board and the company's management, and shaping the company's corporate governance and international legal policies. He is also an Adjunct Professor at Fordham Law School, where he teaches a class on corporate governance. So if you want to hear more, sign up for his class.

Mr. Washington has held a number of positions at Time Warner, and prior to joining the company he was an Associate at Sidley & Austin. Before that, he was a law clerk for Judge David Tytell of the U.S. Court of Appeals for the District of Columbia and for retired Justice William Brennan and Associate Justice David Souter of the United States Supreme Court.

He is one of our own. He received his J.D. from Fordham Law School Magna Cum Laude and his B.A. from Yale College also Magna Cum Laude.

Finally, our Moderator, who was gracious enough to step in on less than twenty-four hours' notice—my heartfelt thanks go out to her—after Stephen Davis was unfortunately unable to join us due to health reasons. Holly Gregory is a Partner at Weil, Gotshal & Manges LLP,⁴⁹ where she counsels corporate directors, trustees, managers, and institutional investors on a wide range of corporate governance issues.

In the public policy arena, she has worked on various governance projects for the European Commission, the World Bank, and the SEC, among others.

In addition to her legal practice and her policy efforts, Ms. Gregory has lectured on a variety of corporate governance topics. She has helped organize corporate governance programs around the world. She has authored and co-authored a number of publications,⁵⁰ including several that focus specifically on the topic of tonight's panel, the role and responsibilities of the board of directors.

Ms. Gregory received her J.D. Summa Cum Laude from New York Law School, and upon graduation she served as law clerk to the Honorable Roger Minor, United States Court of Appeals for the Second

49. For more information, please visit the Weil, Gotshal & Manges LLP website, <http://www.weil.com/> (last visited Apr. 4, 2007).

50. See, e.g., Holly J. Gregory et al., *International Corporate Governance: A Gradual if Incomplete Convergence*, in 1 THE ACCOUNTABLE CORPORATION ch. 10 (Mark. J. Epstein & Kirk O. Hanson eds., 2006); *Corporate Governance Guidelines for Board Practices and Procedures*, in CORPORATE GOVERNANCE: LAW AND PRACTICE ch. 6 (Schwartz & Goodman eds., 2007).

Circuit.

Before I turn the proceedings over to Ms. Gregory, let me try and get things started just a little bit, throw out a few thoughts.

As you're undoubtedly aware, public company boards of directors are subject to many challenges today—hence, the title of this program. What was once commonly described as a sinecure for members of the old boys' club, is now facing increasing pressure by courts and regulators to identify and prevent corporate misconduct.

The Powers Report⁵¹ placed at least part of the blame for the dramatic collapse of Enron on the failure of the Enron Board to exercise sufficient oversight. Congress and the self-regulatory organizations, the New York Stock Exchange in particular, responded by stepping up board responsibilities and requirements for director independence, with these requirements aimed in particular at the audit committee.

The increased emphasis on monitoring creates new tensions. One of these tensions is between the board and the CEO. Boards are under pressure to negotiate CEO compensation more carefully, to terminate underperforming CEOs promptly, and to be wary of pay practices that result in CEOs departing with huge "golden farewells," like the one received by Home Depot's Bob Nardelli.⁵²

Another tension is between the board and the shareholders. Today's institutional investors are demanding more of their directors than ever. They want access to directors. They want to challenge directors' strategic vision. They want to talk about executive compensation and CEO succession. Perhaps the most challenging of these investors are hedge funds, and we'll hear a little bit about the hedge funds' role tonight. Martin Lipton says boards are under siege from activist investors and warns issuers to be prepared for so-called hedge fund attacks.⁵³

A final tension is between boards and the courts. Director fiduciary duties continue to evolve, as evidenced most recently in the Delaware Court's decisions on the duty of good faith and options back-dating.⁵⁴

51. William Powers Jr., *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.*, <http://f11.findlaw.com/news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf> (last visited Apr. 4, 2007).

52. See Julie Creswell, *Home Depot Board Ousts Chief, Saying Goodbye With Big Check*, N.Y. TIMES, Jan. 4, 2007, at A2.

53. Gretchen Morgenson, *Memo to Shareholders: Shut Up*, N.Y. TIMES, Feb. 11, 2007, § 3, at 1.

54. See, e.g., *Ryan v. Gifford*, C.A. No. 2213-N 2007, Del Ch. LEXIS 22 (Del. Ch.

Litigation has the potential to increase director accountability, but at the same time it exposes directors to tremendous risk, particularly in light of the decision by several large institutional investors to target the personal wealth of directors in cases of egregious wrongdoing.

How do today's boards respond and resolve these tensions? Our panelists are here tonight to share their answers based on their extensive experience and expertise. I welcome them.

I now turn the discussion over to our Moderator, Holly Gregory.

PANEL DISCUSSION

MS. GREGORY: Thank you, Jill. That was a perfect lead-in for our discussion this afternoon.

Thank you all for inviting me to join you and this dream team of a panel. I must say, listening to the collective and diverse experience that we have represented here, I can't think of a more perfect panel to address the issues of the kinds of challenges that are facing directors in the boardroom today.

I want to begin by disclosing my own biases to you. As a lawyer, I spend most of my time counseling boards on their governance practices, both in good times and in bad times. These days I'm spending a whole lot of time on option timing issues, but I also work with a number of boards who are just interested in making sure that their practices embrace the evolving notions of best practice, that they're in tune with the guidance being given by our learned jurists from the Delaware courts, and they just want to make sure that they are doing the best that they can in what are challenging times.

Another bias that I have is I really believe that most corporate directors and managers are just like you and me. They really want to do the right thing, they are people of moral integrity, and, just like us, for a whole host of reasons they can make missteps.

My other strong bias is that I am a firm believer that shareholders have a critical and legitimate voice in the governance system and that directors in many companies need to really better understand shareholder concerns. But I think shareholders also need to understand the limits of their voice. They cannot, and should not, govern the affairs of the corporation. After all, that's what they traded in, in return for

Feb. 6, 2007); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, C.A. No. 1106-N 2007, Del Ch. LEXIS 19 (Del. Ch. Feb. 6, 2007).

limited liability. At least that's my simplistic view of things.

There is no doubt in my mind that service as a director today is very challenging, given the array of pressures that corporations face, and also given the heightened scrutiny that they are under from shareholders, from regulators, from the courts, from the media, from a whole host of a cottage industry of governance, rating agencies, and proxy advisors, and from the public at large. So, to me, governance takes place increasingly in a fishbowl, in which it seems that every board action—and every inaction—is potentially fodder for criticism, for shareholder action, for litigation, or for regulatory action.

And then, I think, “Gee, directors are not really paid that highly when you consider things. They’re not paid highly at all when you consider that they put all of their personal assets at risk simply by serving as directors.”

And then, directors play a really important role, I think, in our economic system that really transcends the role that they play for individual companies. It is really largely on directors’ shoulders that effective governance of a company rests.

And we know from a whole body of research that has emerged throughout the world over the past decade that effective corporate governance is key to the ability of entire nations to attract investment capital. So development around the world largely is in the hands of corporate directors in the corporate sector in many nations.

That makes me think of directors, at least to some degree, as public servants, since their risks certainly cannot be fully rewarded and since we all benefit from their efforts.

I want to jump into the discussion here. I want to ask my panelists to each give me a quick disclosure about their own biases, but I want to do it in the context of a particular question. Here’s the setup: We have Sarbanes-Oxley⁵⁵ and SEC rules and listing regulations that create a framework for effective governance, or potentially do. And yet, we know that the quality of corporate governance really is based on the decisions that are made in the boardroom. To my mind, that means they are dependent on getting the right people into the boardroom, making sure that the human dynamic in the boardroom functions well so that consensus views about guidance for the company can be made, and, certainly not to be forgotten, we want them to make good-quality decisions in the boardroom.

55. Sarbanes–Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

So we have some rules that require some things around independence and financial expertise for audit committees, but we don't have a lot of requirements about who should be in the boardroom other than that. And I hope you agree with me that regulation in this area should be extremely limited. We've probably got about the limit of regulation that I would like to see.

And also, we know that board composition rests largely in the hands of directors. At least at the present time, directors are still largely self-selecting. We are having more interest in shareholder access to the proxy and there are increased drives for majority voting, but for a large degree of companies still board composition is in the hands of the directors.

I want to hear from each of you—just sort of a warm-up question—two-to-three minutes about your own biases, and then what you think is the most important quality for a director today.

Why don't we just start at the far end of the panel with Paul?

MR. WASHINGTON: Actually, it's easy for me to disclose my bias, because Bob Clark is the Chair of our Governance Committee, so whatever he says I agree with. That settles that. So, Bob, do you want to go first? No.

I think there are a few qualities that you are looking for in a director. One thing I disclose as a bias is I actually think that the traditional tests for independence from management⁵⁶ are actually over-emphasized in the rules. I think it is very important to have independent directors, but I think that sometimes the tests of independence are a little narrowly focused.

But I also think that equally important, if not more important, to the independence is the quality of judgment and the breadth of experience that directors bring to the role. That is actually something that is extremely hard to regulate, if at all, but I think that is an area that actually doesn't get enough attention by governance activists and others.

That's just an opening gambit.

MS. GREGORY: Kam?

MR. KAMERSCHEN: I guess I'll start with independence. I don't mean independence in the formal sense. I speak of independence in a state of mind; is the individual truly independent in his or her state of

56. See New York Stock Exchange, *NYSE Corporate Governance Rules*, <http://www.nyse.com/pdfs/finalcorpgovrules.pdf> (last visited, Apr. 21, 2007) [hereinafter *NYSE Rules*].

mind.

Second—and this has become very important in boards today—is their skill set. Boards are working very hard now to get a well-balanced skill set, because at the end of the day the board is supposed to be adding value. If you have the right mixture of skill sets, you can make sure that—no one has to know everything; what you can do is combine and take advantage of the individual knowledge and strength of a given director.

The third thing that enters my mind is, obviously, an enormous sense of integrity. That is important in everyday life, but certainly in boardroom activity. It comes into play when there is disagreement; if you have the right sense of integrity, you have to be able to have the courage to offer criticism when noted.

The next thing that pops into my mind is the ability to handle constructive criticism. The well-run boards today have processes of evaluation. On half of the boards that I sit on, I get a scorecard every year showing my peer group evaluation versus the norm of everybody.

The final thing that is active today is, obviously, the role of either non-executive chairman or lead director. That role is very important in helping directors understand what they are doing right and what they are not doing right if there is a problem, and making sure that agenda items are the kind of things that reflect what directors want to talk about, and making sure that the executive sessions are run in a fashion that some construction direction comes out of them.

Those are the thoughts in my head.

JUSTICE JACOBS: Let me take the questions in reverse order.

In terms of what qualities we should expect of a director of any company, and particularly public companies, I agree with everything that was said before. I would, however, put it in a slightly different way, and that is that there are two qualities that are essential, and they are, I think, necessarily in tension with each other. One is what my co-panelists have described as independence, skepticism; the quality of making sure that whatever the director is told is something that the director can be and will make sure can be relied upon based on the director's own common sense and work product.

By the same token, what we do not want, and what I hope that we will be avoiding, will be an adversarial system within the boardroom. That is, there is a tendency and a fear that the independence of directors will pit them against the inside directors or the management, that it will destroy the collegiality that is necessary for the board to be able to

basically do its core job, which is to run the business, oversee the business, and to make sure that whatever steps that are necessary to increase the wealth of the corporation are being taken. I don't think any board can operate successfully without collegiality, and yet that same collegiality has to be exercised by people who will be fiercely independent in their own thoughts.

As far as biases are concerned, since I am here as a public official, I don't have any.

MR. ENGLANDER: Just a word on nominating. It was said that directors choose who the other directors are. I'm not so sure that that's the case in every corporation in this country. I think there are boards out there where the CEO says, "We're going to put this fellow on the board," and the other directors show up with a board package and they get to vote on him. You can read in a proxy statement how does this company elect directors, and that's something we ought to pay attention to.

In terms of my own biases on what makes a good director, just to jump back on the independence bandwagon, to me an independent director is something that can look the chief executive in the eye and tell him what he or she really thinks without any fear of repercussion. If somebody is deriving a meaningful portion of their earnings for the year there, how easy is it to tell your boss to go pound sand? It's a tough thing to do.

Another way to look at it is does the board own stock; are they independent; are they thinking as a shareholder; are they really equipped to represent your interests? After all, that is every director's job. That's the primary thing.

What also becomes very important is to be able to establish an environment where people can communicate clearly. You know, boards are like any other group of people. They're complicated. There's a dynamic in boards that are together for a long time; it can be a family dynamic.

But, in general, a good director can set out "here's what we are trying to accomplish," and that very simple thing, but there are a lot of companies that really don't know what they're trying to accomplish. "Are we trying to get our earnings per share up this quarter, this year, the next five years? What are we trying to do? What are the metrics that are really important?" That gets into compensation and how directors set that.

In general, a good board is very clear about what is important,

keeping everybody on track, and doing that in a way that is constructive.

MR. CLARK: This seconds some of the points already made, but I think that all directors ought to have ideally a certain profile of personal characteristics, which is sometimes summed up in the word “judgment,” and that the board as a whole should be a well-diversified portfolio of knowledge and talents and backgrounds for the company in question.

Under the first heading, if you think about “what would an ideal director be,” he or she should have enough I.Q.-type intelligence and savvy to understand the business and the finance and the decision making that is involved, but also has to have ideally a certain amount of social and emotional intelligence that fits with the boardroom. That means some combination of skills—intrinsic diligence, willingness to read lots of stuff and ask lots of questions and learn over time—but also a great willingness to be cooperative and constructive and yet possess the moral courage—that’s the way I would put it, rather than independence—to say, “Here, after the discussion, is what I really think, and I disagree with you,” even if it’s saying that to the CEO or to the other directors (that’s probably more of a risk, just getting caught into the uniformity bias of small groups), or sometimes saying “No” to a powerful and active outside investor who is trying to jiggle the chain.

Those characteristics—does anyone have them all in the ideal mix? No. But that’s sort of the model.

In terms of the board as a whole, I agree with the suggestion that it’s very important to have people with different skill sets and backgrounds. It’s nice to have a significant number who have actually managed businesses or institutions of some sort, who know what it’s like to be a manager. That’s a problem nowadays because, after the enactment of Sarbanes-Oxley, there has been a decline in CEOs on boards of directors, rather dramatic in the Fortune 500 companies.

You need some people who are legal experts or corporate governance experts, others who are accounting experts, others who just simply know a lot about the particular business in question or the strategic issues. You can’t have one person who knows all of these things. You’ve got to think a lot about how the whole board fits together.

What are my biases? My main bias is I’m in favor of the rule of law.

MS. GREGORY: Thank you. I think that was a really good warm-up.

I wanted to add that I think all directors should be from Missouri,

the “Show Me” state. They should have that mindset of healthy skepticism and really want to have management prove things. They want to push a little on management.

I also wonder how much emotional intelligence the Hewlett-Packard Board⁵⁷ had as a whole. One of the difficulties that you learn working with boards in times of trouble is there need to be times when, even though there are some strong disagreements, people have the ability to come together. Sometimes the way you come together is by putting the really difficult issues out in the open and on the table. I wonder if that’s where the Hewlett-Packard Board had some difficulties.

I want to now begin really with Justice Jacobs. I invite the panelists to break in and interrupt and disagree, but we will also make sure that you all have an opportunity to say anything that you want on every question that I ask.

I thought I would turn to Justice Jacobs. To my mind, the Delaware courts have done a great job in helping directors understand what some of the best practices are that can help keep them out of trouble. One of the things that has been very helpful to me in my counseling to boards is being able to point to some cases and say, “Look here. While you’re not going to face liability if you don’t do this, there is a nice zone of comfort you can create by following best practices that are adapted to make sense to your company.”

You wrote the Delaware Supreme Court’s decision upholding Chancellor Chandler’s decision dismissing the suit against the Disney directors that were related to the hiring, compensation, and firing of Ovitz.⁵⁸ I and many of my clients were watching closely, and we applauded the decision. In particular, we were all very reassured to hear that the business judgment rule is alive, well, and kicking in the State of Delaware. Again, we also appreciated guidance around best practices that I found in those decisions, and also guidance on what some saw as an emerging third prong of the fiduciary duty, a duty of good faith.

JUSTICE JACOBS: I’m waiting for the other shoe to drop.

MS. GREGORY: Well, it’s a soft one.

Can you share with us your views about how the roles and

57. For general information, see Damon Darlin, *Hewlett Packard Spied on Writers in Leak*, N.Y. TIMES, Sep. 8, 2006, at C1, available at <http://www.nytimes.com/2006/09/08/technology/08hp.html?ex=1315368000&en=9a046a2f9635c14b&ei=5088&partner=rssnyt&emc=rss> (last visited Apr. 21, 2007).

58. See *Brehm v. Eisner* (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27 (Del. 2006).

responsibilities are developing and evolving in the Delaware courts and directions that you think that they're going in? And, in particular, I'd like to know if in your view directors should be more or less concerned about being held liable for a breach of fiduciary claim today than they were, say, five years ago?

JUSTICE JACOBS: Let me take the second question first because I think it's the easier one to answer. Certainly, one clear message that was intended by the *Disney* case, and by other cases that were decided after,⁵⁹ is that the business judgment rule is alive and well, and that directors who are acting in good faith, who take reasonable steps to inform themselves and to act prudently, and are not involved in conflict-of-interest situations have nothing to fear from the courts in terms of being at risk for personal liability.

Now, that's not to say that directors won't get sued. It is an unfortunate fact of life that we have become increasingly litigious in our society, and particularly big-dollar transactions do tend to draw litigation. But that is a different question from whether or not there is a serious risk that directors' personal assets will be reachable. It happens very rarely and mostly, with the exception of *Smith v. Van Gorkom*,⁶⁰ in cases where the directors have breached their duty of loyalty, have been found to do that, and as a result there was harm either to the corporation or to the shareholders.

As far as the bigger-picture question is concerned, I think it is fair to say—and I know my fellow panelists will agree and probably have a lot more to say about this than I can—that there has been an evolution in the role of directors and in the expectation of what directors should or should not be doing since World War II.

A number of the panelists were talking about one of the critical roles of boards is to bring to bear their judgment based on their experience on the issues that are before the board in an effort to further the business of the corporation. That has always been the case. But, until 1985—that is, until the *Van Gorkom* case was decided in 1985—there was no consensus, no underlying belief, that directors had a duty, whether in terms of legal duty or best practices, to be activist in any way. Their job was basically to be advisors to the CEO if and when the directors were asked for advice, but not necessarily to have to take

59. See, e.g., *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006).

60. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

initiatives and do anything on their own.⁶¹

That expectation changed, not so much as a result of *Van Gorkom*, but I think had changed by that time. *Van Gorkom*, which did hold a board of directors liable for relying blindly on information that had been given them by a CEO who had basically behind the board's back negotiated a merger of the corporation for an allegedly inferior price, never took the initiative to validate whether the merger price was a fair price, or even the best price that the market would afford.⁶² They were held liable for that. That was at least a milestone, I would suggest, in terms of one changed expectation of the board.

Two other examples. In the 1960s—that is, in the early years after World War II—there was really no expectation that the board would have any significant oversight duties.

We had a case in the early 1960s where senior management of a public company were engaging in price fixing, and as a result the company was prosecuted by the federal government and sued civilly and ended up paying criminal fines and penalties and civil judgments.⁶³ The board of directors was sued for failing to exercise proper oversight, to basically uncover this illegal activity in time. At that point, the Delaware Supreme Court held that, unless there is a red flag that gives the board reason to suspect wrongdoing, that there is no duty to ferret out wrongdoing.⁶⁴ That is, no particular duty of oversight.

By the time we get to the 1990s and the *Caremark*⁶⁵ decision, that expectation had changed. The law has now evolved in a different direction, and we do have a duty of oversight, which I'm sure the other panelists will be talking about. I think that will suffice.

In terms of where we are going, that is the most difficult question. All I have are questions of my own, no answers.

One of the issues that has been raised, and it is the subject of an ongoing debate, is whether public corporations will continue to be director-centered or whether they are going to become more shareholder-centered.⁶⁶ This debate plays out in a number of ways. It is

61. See *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

62. See *Van Gorkom*, 488 A.2d at 865.

63. See *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963).

64. See *id.* at 130.

65. See *In re Caremark Int'l, Inc., Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

66. See Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate* (UCLA School of Law, Research Paper No. 02-04, 2002), available at <http://ssrn.com/abstract=299727> (last visited Apr. 21, 2007).

not the role of the judges to decide those kinds of policy issues. All that we are competent to decide are legal issues that arise out of that.

But let me just give you a couple of examples of issues that I think we may be confronting in the near future and I'll stop.

One is that the developments that are taking place, and, particularly, the increased power of institutional investors, simply because of the volume of stock that they hold collectively, is creating a question both in the academy and, I think, in the courts of what do we mean by stockholders; what is the model that we are going to assume that a stockholder will fulfill.

Let me say it a little bit in plainer English. A lot of the case law basically sees shareholders as a monolithic group of retail investors that are disaggregated, that are very subject to being oppressed or put upon in some way by management, and as a consequence need the diligent help of the courts.⁶⁷ The opinions don't come out and say that, but it is implicit in a number of the cases. The increased power of the institutional investors is raising questions as to whether that is the right model, that is an accurate model of what a shareholder is. If it turns out that that model changes, then it may well be that the law will change as a result.

That issue has come up, or I think may be coming up, in the going-private cases. That is, we have two lines of cases in Delaware law. One is that if a going-private transaction is accomplished by long-form merger, then "entire fairness" is the standard of review, and that is the most rigorous standard that defendants—that is, the boards and the controller—have to satisfy.⁶⁸ On the other hand, if it is possible to orchestrate the going-private transaction as a tender offer, which gets the controller up to 90 percent, followed by short-form merger, then there is no "entire fairness" review.⁶⁹

One of the burning, hot-button issues in corporate law is how is it that we can have very different standards of review for transactions that are different in form but amount to the same thing in substance. That is something that we will have to be facing.

Hedge funds. The role of hedge funds, which we will be hearing about from others, has generated a number of wonderful articles in the

67. See *In re Caremark*, 698 A.2d at 967.

68. See *In re PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 Del. Ch. LEXIS 158 (Del. Ch. Aug. 18, 2006).

69. See *Abrons v. Maree*, 911 A.2d 805 (Del. Ch. 2006).

academic field about the phenomenon known as “empty voting.”⁷⁰ One of these days we are going to be faced with a situation where we have a shareholder that is on the records of the corporation, at least the shareholder of record, and therefore with standing to institute any number of statutory or other proceedings, at least in the Delaware courts, but at the same time will have hedged all of those holdings, with the result that it may be a net-zero equity holder, or even a negative equity holder. The question is, how should the courts react to that? I have no idea of where that is going, but these are some of the issues that we will be dealing with.

MS. GREGORY: Thank you for that. I’m glad I had you go first because you’ve teed up beautifully a lot of the issues that we are going to explore a little bit more.

Before we turn to issues around shareholder tensions with the board, I’d like to invite the panelists to make any comments that they would like, agree or disagree with the learned jurist on issues about what you think is being highlighted in Delaware law. We had a very rigorous discussion out in the hallway before the event started on implications of this line of cases.

Dean?

MR. CLARK: I’d like to talk about that. I have thought a lot about the *Disney* opinions⁷¹ and then to a lesser extent about *Stone v. Ritter*,⁷² which is similar in some ways.

One way of looking at this is as you’ve suggested, Holly, is at the end of the day are directors at serious risk of personal liability for their service. That seems to be a major worry sometimes, and people are glad that the business judgment rule exists.

I don’t frame it that way. I mean you could frame it that way, you could say, “Well, look what happened here in the *Disney* case.” A huge severance payment—\$130 or \$140 million, depending on which opinion you are reading—for fourteen months of work where he didn’t pan out; and a board that was a little sloppy, not best practices in their compensation arrangement. And yet, at the end of the day, the directors

70. See Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006); Jonathan J. Katz, *Barbarians at the Ballot Box: The Use of Hedging to Acquire Low Cost Corporate Influence and its Effect on Shareholder Apathy*, 28 CARDOZO L. REV. 1483 (2006).

71. See, e.g., *Brehm v. Eisner* (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27 (Del. 2006); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005).

72. See *Stone v. Ritter*, 911 A.2d 362 (Del. 2006).

won. That's number one, the first point.

Second, the business judgment rule is strongly reasserted, and it's clear that in Delaware the main thing you have to worry about in duty of care in its examination by courts is the process and the diligence thereof, and even there you get some slack.

And then, if you look at the empirical results, how many directors have actually been held personally liable in these kinds of situations, I think one study I recently looked at in a law review said over twenty-five years something like thirteen people, or thirteen sets of directors.⁷³ Not a whole lot. So it's like the risk of getting hit by a cab when you walk from here over to the Time Warner Center to go to a board meeting. I think that's a much greater risk.

Now, you could say from all of that, "Well, the Delaware law really lets directors off." But I say that's wrong. The interesting phenomenon is to look at the opinions and what they say about the facts and what lawyers who actually read them—not many board members actually read the original post-trial *Disney* opinion, 170-something pages.⁷⁴ Paul Washington sent it to me. I read it. Nobody else on the board as far as I know did. Well, a few. And then, Justice Jacobs' mercifully shorter but still long opinion.⁷⁵

JUSTICE JACOBS: Eighty-nine pages.

MR. CLARK: That's an improvement. I read that, but I'm not sure how many directors on the several public company boards I am on have.

It all comes from the lawyers. And what do they worry about and what do the directors worry about? It's not so much the risk of personal liability, your net worth—although people do have an excessive fear of that risk, just as some people excessively fear that a plane will crash and they will die. It's an irrational risk, but people have it.

But much more strong is the risk that, "Oh my gosh, the *Disney* case, that litigation went on for ten years, it went up and down through the courts." And guess what? It resulted not only in discovery, which is painful enough if you've been on a board for a while and talked to other directors who have gone through discovery—it takes up a lot of time, causes anxiety, wastes your life—they actually went through a trial, which is harassment squared.

73. See Hannah Clark, *Board Members: Guard Your Wallets*, FORBES.COM, June 7, 2006, http://www.forbes.com/ceonetwork/2006/06/07/board-liability-hype-cx_hc_0607boardbeware.html (last visited Apr. 22, 2007).

74. See *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693.

75. See *Brehm*, 906 A.2d 27.

And the management of the company is preoccupied in leading up to the trial. You know, I have spoken to executives who tell me they have spent something like fifteen-to-twenty hours a week for the last two years getting ready for discovery and a trial in a securities fraud class action that is eventually dismissed.

That's what directors who are in the know, have been in the game a while, really worry about, just the torture of the process.

They also worry about reputational risk and shame if there is a big settlement eventually. They don't have to pay personally, but nobody wants them on their boards anymore.

So they care about those two things, the process and the reputational risk, and therefore they turn to the lawyers. The lawyers will say, "The game here is not so much to win at the end of the day. The game is to reduce the probability that the company is going to get sued; and, if it does, to reduce the probability that it goes through the whole grubby practice of full-fledged discovery."

So how do you get to that result? Well, you read the Delaware opinions really carefully and you see, after talking about the Disney directors, what they did and didn't do, the court says, "Well, this wasn't a best-case scenario, but here's all the things they did do. The compensation committee members actually did have a term sheet,⁷⁶ they hired an outside compensation consultant,⁷⁷ two of the members were actively involved in the negotiation,⁷⁸ they all had a rough order-of-magnitude sense in their heads of the value of the options granted,⁷⁹ they all understood the basic theory of the severance package⁸⁰—namely, give him the equivalent of five years of what he would have gotten if Ovitz had stayed at Creative Artist Agency; if he hadn't moved to Disney, what would his wealth have been—give him that plus a little boost of so many million." They all understood all of that. So the court says, "Therefore, we'll let them get by."⁸¹

A lawyer reading all that says, "Hmm, we have a checklist here, and then we've got to add to it." When I'm advising my boards what they should do when they are dealing with compensation issues, we go through this checklist and then some, because our goal is just to reduce

76. *See* In re Walt Disney Co. Derivative Litig., 907 A.2d at 708.

77. *See Brehm*, 906 A.2d at 38.

78. *See id.*

79. *Id.*

80. *Brehm*, 906 A.2d 27; In re Walt Disney Co. Derivative Litig., 907 A.2d 693.

81. *See Brehm*, 906 A.2d at 38.

the litigation risk and hassle and reputational injury.

The Delaware law, in effect, has a kind of genius to it. It actually does put the management in the board and prevent personal liability on the basis of second-guessing and hindsight, but it also has enough in the opinions to create a kind of continuing anxiety and constructive diligence on the part of boards, maybe over-diligence sometimes.

MS. GREGORY: Paul, do you want to add anything?

MR. WASHINGTON: I think the only thing I would add to that—because, of course, I agree with Bob—is actually I think we can, just looking at this question purely legally, take some greater comfort from the later *Disney* decisions,⁸² as compared to the 2003 decision on the motion to dismiss,⁸³ because one thing that I think the Delaware courts did, having gone through the trial, is they showed a greater understanding of the role of the compensation committee and the role of management in these sorts of situations.

For example, one of the factors that was flagged in the 2003 decision that indicated the board might have breached its fiduciary duty was that they had delegated the actual final negotiation and signing the contract to management, that the board had only looked at the terms of the deal.⁸⁴ When you get to the later *Disney* decisions, that is actually a good thing, because it shows that the board trusted management to do this—the board looked at the term sheet, and that was in fact the right thing to do.⁸⁵ So I think the case law shows a greater sophistication and understanding over those few years. I think that is a good development.

But I would say that the purely legal developments are just a very small portion of the pressures facing boards. What is really driving them is not concern about abiding by their fiduciary duties, or even the risk of litigation, but it is in fact things like pressure from stockholders, a range of them, some of which are activists, some of which are not; pressure from governance groups—for example, Institutional Shareholder Services⁸⁶ (ISS), a for-profit organization—as a practical matter can have a persuasive authority over, let's say, 30–40 percent of the shares of a company. That's incredibly powerful. They have their own governance guidelines.

82. *Id.*

83. *See In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003).

84. *Id.*

85. *See In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005).

86. For more information, please visit the Institutional Shareholder Services website, <http://www.issproxy.com> (last visited Apr. 11, 2007).

MS. GREGORY: But, Paul, are you meaning to suggest that ISS is making our boards better governed? I find that appalling.

MR. WASHINGTON: I think they are certainly putting pressure on boards to comply with their requirements.

JUSTICE JACOBS: That's surely a huge factor in acquisitions. People trump what ISS approved. People are certainly worshipping at that pew, for better or worse.

MR. CLARK: But we should distinguish important factor versus good factor, right?

MR. WASHINGTON: Right. I think the jury is out, frankly, in a whole lot of areas as to the practical effect of corporate governance, some of the specific provisions that are advocated by some activists.

The other factor besides the activists and the corporate governance groups, frankly, is just the press. This goes to Bob's point on reputation. Gretchen Morgenson⁸⁷ is read by a lot of people in *The New York Times*.⁸⁸ *The Wall Street Journal*,⁸⁹ you don't want to wind up on the front page there.

I think those sort of hydraulic factors put pressures on the board that, frankly, far exceed anything that the Delaware courts might do. The Delaware courts are just the starting point.

MS. GREGORY: Kam?

MR. KAMERSCHEN: I'd just like to express a concern here. The headline is "risk aversion." I am getting very concerned about the boardroom and actions that inhibit risk-taking.

If I remember my economics correctly, one of the basic laws is profit varies with the degree of risk—guarded risk, considered risk—but it does vary with the risk. It seems to me that that in all of this evolution—and it is an evolution of governance practices—no one should disagree with the premise of the monitoring of the health, the performance, the risk of a business. I think the value-added side is how boards are going to bring value to the shareholder, because that is at the end of the day their number one obligation.

The second comment I would like to make is I thought it was a very profound thing that the Justice mentioned, which is this difference

87. Gretchen Morgenson is assistant business and financial editor and a columnist at the New York Times.

88. For more information, please visit The New York Times website, <http://www.nytimes.com> (last visited Apr. 11, 2007).

89. For more information, please visit the Wall Street Journal website, <http://online.wsj.com/public/us> (last visited Apr. 11, 2007).

between director-centric and investor-centric or shareholder-centric. That is a very fine line.

One of the questions that this country is going to have to ask itself is: Where's the supply of directors if the directors are going to continue in some semblance of their current role? The power shift is such that if much of their value-added input is compressed in some way, then that is a pretty serious consideration to put in place.

That's all.

MS. GREGORY: Any other comments before we move on? I'm glad to finally hear a little bit of interjection of some maybe mild disagreement.

I know that I am hearing from a lot of boards that they are exhausted by the compliance efforts that they have had to undergo in the last couple years, complying not only with a host of new rules,⁹⁰ but the ideas that ISS and other groups put out as a sort of absolute slate that must be adopted. A lot of them really want to get back to what is really interesting about serving as a director, which is trying to help the company think about how to perform more competitively, think about the strategic issues.

We hear that constantly right now. It's interesting to hear from a whole host of boards at the same time. We see waves of concerns. Right now the concern we are seeing is boards that are saying, "We don't think we're spending enough time on strategic issues, on risk issues, and the kinds of things that are really going to drive the performance forward."

MR. KAMERSCHEN: Just one headline on that point. McKinsey & Company did a study⁹¹ in February of 2005, I believe, that had a lot of startling figures. But the one that really resonated with me was that only 11 percent of directors—there were 1,200 directors surveyed—felt they fully understood the strategy of the company.⁹² Now, that is scary.

MS. GREGORY: And Booz Allen⁹³ did a survey about the same time that showed that the amount of money that's lost in strategic missteps is far greater than the amount that is ever lost through fraud and

90. See *NYSE Rules*, *supra* note 56.

91. McKinsey & Co., *The View from the Boardroom*, THE MCKINSEY QUARTERLY, 2005 SPECIAL EDITION: VALUE AND PERFORMANCE, 2005.

92. *Id.*

93. For more information, please visit the Booz Allen Hamilton website, <http://www.boozallen.com/about> (last visited Apr. 21, 2007).

managerial wrongdoing.⁹⁴

MR. ENGLANDER: Not to pile on, but just in terms of the administration taking over everything a board does, we recently had a compensation committee meeting where we set aside about five hours to think about what we were going to pay people in the company for the next year. We ended up spending seven hours trying to figure out how we could actually physically grant options to people, because under California law—now, granted, you can argue that California is a communist state, but we have to deal with it—basically either someone from the board or the CEO or the president has to physically be there when we are granting the options. So we had to figure that out. And now we've got this whole back-dating mess. So we just spent seven hours, where directors were flown in from all over the place, just talking about that. We didn't spend any time thinking about the minor issue of how should we pay people.

MS. GREGORY: Paul?

MR. WASHINGTON: I would suggest—this goes back to the first thing we were talking about, who should be on the board—that there are enormous pressures these days to comply with independence requirements and so forth. What that can do is that can drive you away from having people on your board who are actually familiar with your industry because they couldn't have worked for your company within a certain range of years. They might not be able to have some other associations with it. They probably can't be an investment banker who advises your company currently, because if they are then they couldn't serve on your audit committee because that would preclude the investment firm from doing work for you. There are all sorts of rules that are keeping knowledgeable people, people who really understand the industry, from serving. These are on top of the traditional Clayton Act rules of not being able to have competitors serve.⁹⁵

MS. GREGORY: I like to think of that as the “independence paradox.” We are requiring independent boards, and we are making them through the compositional requirements at the same time more dependent than ever on management for information because they don't have their own separate sources. I hope that you don't think that I am

94. See Booz Allen Hamilton, *New Report Reveals Causes for Shareholder Value Destruction*, <http://www.boozallen.com/publications/article/659454> (last visited Apr. 11, 2007).

95. See 15 U.S.C. § 19 (2007).

against independent directors. I think we need a lot of them, but I think we do really have to think about how do we overcome that information flow issue.

I want to move on. I want to come back to you, Kam. We heard Justice Jacobs talk about the evolution of the directors' role over the last modern history. We know that the relationship between the board and the CEO has been certainly evolving in that same time period. For much of our modern history, as Jill noted, the CEO was king and chairman and the board could be described as "the parsley on the fish,"⁹⁶ from the famous quote. My sense is that that has been significantly changed. Boards now understand that they do have something to do other than to come to the meeting and accept the gold piece.

So I was wondering if you could share your perspective. Specifically, I understand that you served as the chairman and the CEO of your company, and yet you also in your introductory remarks talked about the importance of having some form of independent leadership, if you will, in the form of a non-executive chair or lead director.

MR. ENGLANDER: Quit picking on Kam. That's not nice.

MS. GREGORY: No, I'm not picking on him. It sounds like he is one of those management people who have evolved.

So could you talk a little bit about your experience as CEO and chair and how you see the role having changed from the time when you wore both hats to now?

MR. KAMERSCHEN: I guess the headline would be "It's a work in progress." The evolution of that relationship is definitely a work in progress.

But it is really manifested in what you opted to call this panel, "New Challenges in the Boardroom." Those new challenges have had enormous implications in relationships. Several panelists mentioned this collegiality and working together.

I really think it manifests or reflects best in the recognition of a fact.

96. American Enterprise Institute for Public Policy Research, *When Federalism Works-Why Kill It?*, *Federal Initiatives on Corporate and Financial Regulation*, available at <http://www.aei.org/events/filter..eventID.639/transcript.asp> (last visited Apr. 12, 2007). Peter J. Wallison of the American Enterprise Institute said:

[F]or a long time, people did not view corporate governance as being particularly relevant to anything but the corporate lawyers and there was a belief that there was no connection between the way the board was structured. It was always called the parsley on the fish. If the fish swam okay, who cared about the parsley.

Id.

The fact is that companies, when Sarbanes-Oxley⁹⁷ came along, were in one of two states: either they were really poorly organized, in which case it was a dramatic, desperate turnaround in a very short period of time; or they were in some kind of transition. They were good companies, but they were all working towards the major transformation.

To me the major transformation is this. Step one was really governance as measured by input—new processes, new structures, new ways of trying to improve the governance process, I guess as exemplified by Section 404,⁹⁸ which dominated, obviously, audit committees beyond imagination for a long period of time, not to mention the costs, of course. But that was an important step to get everybody tuned in, and everybody had to scramble.

The state we are at now is moving towards a transformation that I would describe as moving from compliance to value-added, to competitive advantage. Directors, most of us that do this, do it on the basis that we can bring some kind of contribution. We really take seriously the shareholder value mandate that is operational. But, instead of governance measured by input, importantly, governance should be measured by output. The output should be the true value-added that directors are making to that.

If you follow that, that has tension in it. It has tension in it among directors themselves. It has tension in it with the CEO relationship and the board. It is a very complex subject.

I started this year sitting on six public boards. Each one of them was an individual case of evolution in this very factor that we are talking about. It is very complicated.

At the end of the day, think about this. Shareholder value is an end result. What you have to ask yourself is: What is it that drives shareholder value? At the risk of over-simplification, I would say that it is profitable and sustainable growth. Both of those adjectives are very important, because growth without profit is profitless prosperity, and who needs that; and growth that isn't sustainable is an accident, so who needs that?

But then you ask yourself: What is it that drives profitable and sustainable growth? I would respectfully submit it is customer value.

What directors should really be focusing on in terms of competitive advantage, value-added, et cetera, is really grilling management teams

97. Sarbanes-Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

98. 107 P.L. 404 (2002).

and working together collaboratively, trying to say, “How can we enhance the value proposition of this particular enterprise to the customers that it serves?” If you do that, then you will have the second stage of this, which is compliance, which is always going to be important. The monitoring, the financial performance, the health, the risk of the company is a given mandate of a director. But more importantly, for the benefit of the corporation and the benefit of the directors—and you want quality directors—that is what you are going to have to have.

MS. GREGORY: So should we separate the role of chairman and CEO?

MR. KAKMERSCHEN: It’s interesting, the ISS’s and the other services’ point of view on this, unless it has changed recently. They have taken the position, informally if not formally, that they accept the notion of a lead director as a perfectly suitable alternative. I happen to serve as lead director on two boards. That gets the kind of independence and the voice I think directors need in dealing with not only intra-director issues but also inter-director issues.

The position that the ISS, I believe, has taken—and this one I tend to agree with—is in a highly troubled situation, there is great benefit to having an independent chairman, not executive chairman. I happen to concur with that conviction.

MS. GREGORY: Any thoughts from others? Bob?

MR. CLARK: One thing that resonated with me was this emphasis you had on the real role of the board. I have been on, I guess, eight public company boards over time, many of them well before the Sarbanes-Oxley Act⁹⁹ and related listing requirement reforms, and I have seen it evolve. I guess the way I would summarize my impressions of the time spent in boardrooms is that before the scandals and the reforms, to my surprise as a corporate law academic, the vast majority of time spent at board meetings was about business matters, not about legal risk or compliance. It was like 90/10, and 90 percent was on the business, good stuff, important stuff.¹⁰⁰

99. Sarbanes–Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

100. For the most recent information suggesting a shift in time see Becky Bergman, *Time for Reflection*, BANK DIRECTOR MAGAZINE, 2nd Qtr. 2006, available at http://www.bankdirector.com/issues/articles.pl?article_id=11778 (last visited Apr. 22, 2007) (noting “[e]ven the estimated average time spent on board matters—including review, preparation time, meeting attendance, and travel—has changed, according to a USC/Mercer Delta Corporate Board Survey updated in March 2005. In 2004, members

In the wake of the SOX-related governance changes, there was a period of about three years, I would say, where the balance shifted the other way rather dramatically. Suddenly, we need all sorts of independence, we need special self-evaluations, we have audit committees, comp. committees, and nom. and gov. committees that are independent and that have to follow little checklists of things to do to comply, as well as executive sessions and self-evaluations and all that. And then, the 404¹⁰¹ process, internal controls, had to be tested and worried about. So there was a huge shift in proportion of time spent on compliance matters.

I think it is going back now, and that's a good thing. Jay Lorsch¹⁰² and I—Jay Lorsch is a Professor at the Harvard Business School—were co-leaders of a survey¹⁰³ of directors a couple of years ago, asking them what they thought were the most important categories of qualities in boards and among directors in relationship to shareholder performance. Perhaps not surprisingly in retrospect, the vast majority of our respondents thought that the kinds of things emphasized in the SOX-related reforms—the independence, the formalities, and so on—were either counterproductive or only moderately helpful, and by far and away the two most important things are the qualities of directors and then the time spent intelligently discussing business strategy and major business decisions.¹⁰⁴

That is still a kind of dominant theme that I get from directors: “We really ought to be spending a greater percentage of our time learning about the business environment, our comparative advantages, the perils and promises of our current strategy, and what the alternatives are, that kind of thing.” I think many boards are trying to go back to that. Hopefully, the law is going to let them do it.

MS. GREGORY: Broad agreement across the table, nodding heads in agreement with that.

MR. WASHINGTON: On that score, it's interesting that the New

spent 188 hours serving public boards, up from 180 hours in 2003 and 156 hours in 2001”).

101. 107 P.L. 404 (2002).

102. Jay W. Lorsch is the Louis Kirstein Professor of Human Relations at the Harvard Business School.

103. This survey is on file with the authors and could not be referenced in time for publication.

104. *Id.*

York Stock Exchange Listing Standards¹⁰⁵—which really, frankly, I think, more than Sarbanes-Oxley,¹⁰⁶ have dictated what companies do these days in the area of governance—do not actually devote really any attention at all to the board’s role in reviewing strategy. I think there is one little line that talks about business plan and budget under what you need to have in your corporate governance policy, and that’s it. To my mind, that’s the fundamental role of the board.

In terms of separation of chairman and CEO, the only thing I would suggest on that, besides saying that one size doesn’t fit all there, is that, in terms of a troubled company, I think it depends on what the trouble is.

Actually, to give Time Warner as an example, we had separated the chair and CEO roles.¹⁰⁷ The board decided actually to unite the roles in the current chair and CEO, at a time when the company was in some degree of distress.¹⁰⁸ But the board thought: What we need most now is clear accountability, clear decision making, so let’s vest the responsibility for both running management and running the board in one person at that time.

So it depends on what the problem is. You could have a situation where the company is really troubled, where you actually do need to split them. But it depends on the problem that the company is facing.

MR. KAMERSCHEN: I had a professor who once said, “All generalizations are false, including the one I just made.”¹⁰⁹

MR. WASHINGTON: Yes.

MS. GREGORY: Daniel?

MR. ENGLANDER: I want to react to something that Kam said before. I think he used the words “create value for customers” in terms of what is important. That is really a critical question: What’s important? How is one company doing a good job and another company

105. See New York Stock Exchange, *NYSE Listing Standards*, available at <http://www.nyse.com/regulation/listed/1147474807436.html> (last visited Apr. 10, 2007); see also NYSE, Inc., Listed Company Manual § 802.00 (2007).

106. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

107. See Bill Baue, *Shareowners Push TimeWarner on Movies Depicting Smoking, Recycled Paper, and Pay Disparity*, SOCIALFUNDS.COM, Aug. 9, 2006, <http://www.socialfunds.com/news/article.cgi/2080.html> (Susan Duffy, vice president of corporate communications at TimeWarner, “points out that the board did separate the CEO and chair roles for two years, but in 2003 decided to re-combine them”).

108. *Id.*

109. Mark Twain said: “All generalizations are false, including this one.” http://thinkexist.com/quotation/all_generalizations_are_false-including_this_one/216596.html (last visited Apr. 7, 2007).

doing a bad job? Forget how important a director is. Let's focus on that question.

I think to me the answer to that question is maximizing after-tax cash over a long period of time, period, full stop, beginning and end. And shareholders have a magic ability to influence that decision. Sell your stock. You don't have to call up Time Warner. I'm sure you've had a lot of fun conversations with Carl Icahn.¹¹⁰ You don't have to rattle sabers.

It's a company's job to tell you in their annual letter—it's right there in their annual report, first thing, letter usually from the Chairman, the CEO, sometimes it's two letters—what's important. What are they telling you they're trying to maximize? Are they trying to do things for the CEO's name to get on a stadium or increase their profile, or are they trying to make you money?

Now, there are so many things that go into that, but there is a scorecard. The only thing within reason that you should be debating in terms of that scorecard is: "Well, what's a reasonable period of time?"

MS. GREGORY: Thank you.

I'm going to move on. We seem to keep circling back in most responses to questions to issues around shareholders and the tensions with shareholders. It's just about seventy-five years since Berle and Means published their treatise¹¹¹ on the separation of ownership and control. It seems to me that we are all still struggling with what the

110. See *Forbes 400 Richest Americans*, FORBES, 2006, available at http://www.forbes.com/lists/2006/54/biz_06rich400_Carl-Icahn_L1XF.html (last visited Apr. 7, 2007). Forbes's list of the 400 richest Americans ranked Carl Icahn as 24th and included the following biographical information:

Shareholder activist spent 6 months negotiating with Richard Parsons over Time Warner's board. Icahn and group of investors bid to split up media giant last August. Agreed to settlement in February: Time Warner to buy back \$20 billion in stock, cut costs by \$500 million in 2007, install 2 independent directors to the board with Icahn consulting. Stock flat since buying stock; says he intends to be patient, shares will eventually rise. Grew up middle class in NYC's Queens. Studied philosophy at Princeton. Started NYU med school; dropped out. Became stockbroker for Dreyfus Corp.; moved into securities arbitrage. Borrowed to buy NYSE seat 1968; bought firms, forced managers to improve, buy back stock. Big scores in 1980s with takeovers of Texaco, USX. Owns \$2.6 billion stake in American Real Estate Partners; stock up from \$9 a share in 2003 to \$53 today on gains of oil, real estate and casinos. Recently sold stake in National Energy for \$1.5 billion.

Id.

111. ADOLF A. BERLE AND GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Harcourt, Brace & World, Inc. 1932)

appropriate apportionment of decision rights as between shareholders and the board is.

We are in the early stages right now of this proxy season. The number of shareholder proposals we are seeing is considerable.¹¹² It is not as high as it has been, but it is considerable. We are seeing that shareholders continue to seek declassified boards and heightened standards of independence. We are also seeing a lot of proposals related to executive comp, and pay for performance continues to be popular.

And then, shareholders are now, I think, just in the last several years, also focusing on their own voting rights. We are seeing proposals seeking an advisory vote on executive comp.. The Council of Institutional Investors just came out in support for that.¹¹³ I'm sure you're all aware that the Frank Committee is set to vote tomorrow on proposed legislation on shareholder advisory votes.

Majority voting is also a very hot topic in the proxy season. Approximately 200 of our large public corporations have adopted that voluntarily.¹¹⁴

And proposals for access to the proxy are also gaining ground. Didn't win a majority vote at Hewlett-Packard several weeks ago, but 43 percent of the vote is pretty high.¹¹⁵

So I want to ask you, Dean Clark, how should boards respond to demands from shareholders for governance changes? Should we be concerned about the proliferation of these kinds of proposals? Are these kinds of demands and concerns really changing how the board functions? Is this helping the board focus on the strategic issues, or is

112. Diane K. Schooley, Celia Renner, and Mary Allen, *Corporate Governance Reform: Electing Directors Through Shareholder Proposals*, THE CPA JOURNAL ONLINE, Oct. 2005, <http://www.nysscpa.org/cpajournal/2005/1005/essentials/p62.htm> (last visited Apr. 10, 2007).

113. For more information, please visit the Council of Institutional Investors website, <http://www.cii.org/about/> (last visited Apr. 7, 2007).

114. Dennis K. Berman, *Boardroom Defenestration --- As Proxy Season Heats Up, Companies Consider Rules to Boot Unwanted Directors*, WALL ST. J., Mar. 16, 2006 (indicating "[o]ver 120 companies have some form of majority voting in place, according to the Council of Institutional Investors"); see also Council of Institutional Investors, Majority Voting information page, <http://www.cii.org/majority/index.htm> (last visited Apr. 7, 2007).

115. Office of State Treasurer, Denise L. Nappier, *Institutional Investors Say HP Proxy Resolution Demonstrates Widespread Endorsement for Proxy Access*, Mar. 15, 2007, <http://www.state.ct.us/ott/pressreleases/press2007/pr031507.pdf> (last visited Apr. 9, 2007).

this all sort of a detour?

MR. CLARK: No, it's not a detour. I think what it reflects is a long-term trend in the composition of shareholders since the mid-twentieth century to now. The percentage of stock held by institutional investors has continued to go up. It is now quite significant, over half.¹¹⁶ And, even more interestingly, the kinds of financial intermediaries between the companies and the ultimate individual beneficial owners of stock are in diverse sets. You have not only the mutual funds, which have their own mode of being; but pension funds affiliated with unions; and state and local government entities, which have another characteristic attitude; and then you have a lot of hedge funds, private equity, and unregulated intermediaries, which have yet another slant on things; and then you even have a small but not trivial number of socially responsible investment institutions. So we have more intermediaries, more diversity among them.

And communication costs are much, much lower now than they used to be, because of the Internet and computers. What does this mean? More activism of many sorts.

It raises the question: What's a board of directors to do? How responsive should you be to shareholder activism? That's the basic question that you are asking.

The answer is it all depends on the particular context. I can see at least three different—well, there are many, many different situations. I would just suggest, since I thought about this, three paradigmatic scenarios that would tend to provoke a rather different reaction from a truly conscientious, well-intentioned board that is trying to fulfill its fiduciary duties to the company and all the shareholders.

One would be a hypo about takeover defenses.

Another would be a hypo about how to respond to an activist

116. Press Release, The Conference Board, U.S. Institutional Investors Continue to Boost Ownership of U.S. Corporations, Jan. 22, 2007, http://www.conference-board.org/utilities/pressDetail.cfm?press_ID=3046 (last visited Apr. 10, 2007). The Conference Board stated:

Latest available year-end 2005 data show that U.S. institutional investors—defined as pension funds, investment companies, insurance companies, banks and foundations—suffered a brief hiatus in the trend of steadily increasing ownership during the market break of 2000-2002, but have since rebounded robustly to control \$24.1 trillion in assets in 2005, up from a low of \$17.3 trillion in 2002. Institutional assets thus grew 19.0% in the 2002 to 2003 time period, another 11.7% from 2003 to 2004 and yet another 5.1% from 2004 to 2005.

Id. (citing The 2007 Institutional Investment Report, Report #1400).

private investor group—say, Carl Icahn—or a bunch of hedge funds trying to rattle your chain, asking for a different financial policy, a different business asset composition, a different strategy—”And oh, by the way, give us seats on the board if you don’t agree right away.” That’s a second paradigm.

A third would be what you mentioned, the activist shareholder resolution wave, especially as it is initiated by union-affiliated pension funds. If I’m not mistaken, there are sixty or something shareholder proposals asking companies to adopt advisory votes on executive compensation this season.¹¹⁷ It’s a new thing. It’s the hot new thing in 2007. I think the vast majority of those are proposed by union funds.¹¹⁸

So there are three very different kinds of activism that you might have to respond to. My attitude as a director is: Well, it all depends which context it is.

If you go back to the 1980s and take a pure care of a takeover attempt—and nowadays the parallel would be a shareholder resolution asking a company to declassify its board so it could be subject to a takeover—but imagine an old-style case: an unsolicited bidder makes an offer for a target company, to buy all of the shares for cash; it’s fully financed; it’s a 50 percent premium; and they are going to hold the offer open for sixty days, three times the minimum under the Williams Act.¹¹⁹

The company at that point has to think: “Gee, how do we respond to this?” If you are an honest director, what do you do? Well, putting aside what the case law allows you to do, my instinct would be we should be responsive to the shareholders who suggest that we lift our poison pill defense and let this offer go through.

Why? Well, because the people who are initiating it have a lot at stake. Their incentives are probably good. That is, they are putting their

117. Andrea Musalem, Associate Counsel, Governance Research Service, *International Investors Endorse Pay Votes*, CORPORATE GOVERNANCE BLOG, Feb. 8, 2007, available at http://blog.issproxy.com/2007/02/international_investors_endors.html (last visited Apr. 10, 2007) (“So far this proxy season, labor pension funds and other U.S. investors have filed more than 60 proposals seeking advisory votes on pay practices.”).

118. Eric John Finseth and James Carlson, *Storming The Ramparts: The Ongoing Shift In The Balance Of Power Between Shareholders And Incumbent Boards Of Directors*, Mayer Brown Rowe & Maw, Mar. 16, 2007, available at <http://www.mayerbrownrowe.com/publications/article.asp?id=3381&nid=6> (last visited Apr. 10, 2007); see also Kim Chipman, *Labor group vs. executive pay*, INT’L HERALD TRIB., Mar. 1, 2007, Finance at 20.

119. 17 C.F.R. § 240.14d-11 (Securities Exchange Act Rule 14d-11).

money where their mouth is, so they have enormous motivation, if they are going to pay such a premium to get the company, to make it work.

Second, there is not likely to be that much conflict among different kinds of shareholder interest. You know, everyone has an opportunity to sell and get bought out at the same price, and probably most shareholders want it.

Third, the interests of the directors and the management are probably not pure. They are worried about losing their positions.

So in that context I would say put it all together. It suggests maybe we should lift the pill, or at least solicit another bid, or maybe try to explain why we should be independent, rather than fight this.

Now switch to my second kind of hypo, the Carl Icahn person who just hypothetically buys 3 or 4 percent of the shares of a large public company and then starts saying, “You know, you could run this company better. Leverage up. Start buying back a lot of stock. Do it through a self-tender offer. You don’t have anything like optimal tax efficiency because you’re under-leveraged. And you give yourself too much discretionary power, so you don’t have an incentive to cut costs. And you have an over-incentive to engage in dubious acquisitions and new projects. So leverage up, buy back. Also, split up the company, get rid of the business that’s causing trouble, AOL”¹²⁰—I’m sorry I can’t resist the real-life example—and aggressively move into the digital era much more than you are doing.” This is the kind of stuff that directors usually think about.

What should a board do when faced with that? My answer is it should think about it all, understand it clearly, but be selective in its responses. Ultimately, if you think about it, what is a board going to say? “It’s our power to make the decision. It’s our duty to do it right. We have an informational advantage, at least on the company-specific side if not on general management. We are not afflicted with over-confidence bias”—a cognitive phenomenon that some activist investors display a lot of—and our motives and our incentives are pretty good. And meanwhile, we think that maybe the incentives of the activists are not entirely pure. They have a big stake. They want the company to be profitable, but they may also be desiring something that is not in the best

120. Steve Rosenbush, *Icahn’s Plans for Time Warner*, BUS. WK. ONLINE, Feb. 8, 2006, http://www.businessweek.com/technology/content/feb2006/tc20060208_819438.htm?chan=search (last visited Apr. 10, 2007).

interests of the other shareholders. So, by the way, let's ask the other shareholders what they think about these proposals." So make a bunch of selective decisions about the particular changes.

Then, we finally get to your hypo, the wave of shareholder resolutions. That is for me much harder. I could make an argument on advisory votes on executive comp. that a board could easily say: "You know, this is not an appropriate thing to do, to have this process. Why? Because it's really our power and duty to set compensation." That's one point, who has the duty and power under existing arrangements. "Two, we have an informational advantage. We know who are the valuable executives and what it is really going to cost to recruit, retain, and incentivize them."

MS. GREGORY: Can I interrupt you for a minute? I understand that our learned jurist needs to leave us to catch a train, and I want to give him an opportunity to just break in and say a few words in reply.

JUSTICE JACOBS: I wasn't planning to do any of that. I just want to apologize to my fellow panelists and to all of you for having to leave before this program was over. I promised my wife on pain of divorce that I would be home before midnight, so I have to catch a train. Thank you for your attention.

MS. GREGORY: Thank you very much.

MR. CLARK: I was trying to rehearse all the reasons why a board could say no to such a resolution request to put it on the proxy statement, or advise shareholders to be against it.

I guess probably the most striking difference from this and the other cases of activism is that often these proposals are put forward by funds that are not just interested in the financial returns to the stockholder group but are pursuing some other objective, such as make this a more equitable society in terms of pay disparities and highlight the fact that employees of companies, who are the people who have money in the union pension plans, who are in a much different part of the economic scale—maybe give them a little indirect bargaining power by highlighting this in the shareholder resolution process. That's all great.

The problem is it may not be in the interest of all of the shareholders as a class. So that dispersion of interest is something that a board has to take into account.

So what do you do? At the end of the day, I am still sympathetic to these resolutions. I guess I'm a softy. I like to hear what people have to say. But I do think you have to be selective and attend to those situations where a board has a comparative advantage in terms of

information, incentives, and the big picture, and those where it doesn't.

Or, to put it another way—I was going to suggest this to Justice Jacobs, but he left—there ought to be a new fiduciary duty on the part of boards in this new era of shareholder activism, which is the fiduciary duty to listen. That is, we have a fiduciary duty of care, which has been spelled out by the courts to include a duty to monitor, have a law compliance program and information system;¹²¹ a duty to be diligent and careful in making decisions;¹²² a duty to gather information.¹²³ Well, I'm suggesting something else: a fiduciary duty to actually, not in all contexts but in certain contexts, consider and evaluate the opinions and judgments, the arguments and theories and recommendations of important shareholder groups. Now, duty to listen doesn't mean you will actually accept the recommendations, but I think it is implied as an aspect of the aspirational duty of care.

MS. GREGORY: Well, thank you for that.

In the interest of time, I'm going to jump right over to Daniel and ask for your perspective. For much of the last ten years, the concern about shareholder activism has really focused on the large public pension funds and the union funds, as the Dean said, and the concern was often that they had another, very political agenda. Now it is a new group that has the business community concerned I would say, the hedge fund. I think that there is some concern that some of them also have a hidden agenda. After all, we don't always know which way they are hedging.

I was wondering if you could talk about how you see the interest of hedge funds and active shareholder strategies as potentially impacting corporate governance and the relationship more broadly between boards and shareholders.

MR. ENGLANDER: First of all, not to steal Paul's thunder, but I do agree with pretty much everything Bob said, and I am looking for a job at Time Warner.

You know, it really does depend on who you are talking about. I mean another thing is we are talking about Carl Icahn and Time Warner. I think Carl has a pretty healthy interest in seeing himself in the papers and on TV. Just because he makes a tender offer, does Carl Icahn know

121. See, e.g., *In re Caremark Int'l, Inc., Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); see also *In re Abbot Labs. Derivative S'holders Litigs.*, 325 F.3d 795 (7th Cir. 2001).

122. *In re Caremark*, 698 A.2d 959; see also *In re Abbot Labs.*, 325 F.3d 795.

123. *In re Caremark*, 698 A.2d 959; see also *In re Abbot Labs.*, 325 F.3d 795.

more? How many different businesses has that guy gone after? No disrespect—I mean he has obviously done fabulously well—but he just might not know better about every individual case.

I think the first thing to really establish is—the first fallacy is that the market today has the value of the company right. That is just not always the case. Anybody who has read any single thing that Warren Buffett¹²⁴ has written—just because the market is quoting you a price today, that doesn't mean it's what it's worth. And so if the stock is at \$20 and someone comes along and says, "Here's \$25, and come on, respond to me," well, I guess you have an obligation to think about. But do you have to do it; and, if you don't do it, why? Is it really in the best interests of shareholders to turn around and put the company in play just because somebody decided that they could borrow a lot of money on attractive terms and put the thing in play?

So I think when we are talking about activist proposals specifically designed to create value, the first thing you ought to ask yourself is what is the business worth, which gets back to understanding the business. If you have a good handle on that and you can communicate that clearly, then you ought to be in a position to respond.

MS. GREGORY: Great.

Kam, a short comment, and then I want to move to Paul on some executive compensation things. We can circle back to these issues, but I want to make sure we have time for the audience to engage.

MR. KAMERSCHEN: Just a quick headline. I was on a panel¹²⁵ at the University of Wisconsin about a month ago, and two of the panelists were outraged by the hedge funds. Their principal argument was the short-term thinking of the hedge funds. I shared with them a little fact, that in 1970 the average mutual fund held a position in companies for six years;¹²⁶ today the average mutual fund holds it for less than a

124. Warren Buffett is the Chairman of the Board of Berkshire Hathaway, Inc. For more information on Warren Buffett, please visit the Berkshire Hathaway website, <http://www.berkshirehathaway.com/> (last visited Apr. 10, 2007).

125. University of Wisconsin-Madison Director's Summit, Corporate Governance Director's Conference, Nov. 2-3, 2006, available at <http://exed.wisc.edu/directorssummit/outline.asp> (last visited Apr. 23, 2007).

126. Remarks by John C. Bogle, Bogle Financial Markets Research Center, *The Mutual Fund Industry 60 Years Later: For Better or Worse?*, FINANCIAL ANALYSTS JOURNAL, January/February 2005, available at http://www.vanguard.com/bogle_site/sp20050102.htm (last visited Apr. 10, 2007).

year.¹²⁷ So I wonder who is short term.

MS. GREGORY: Good comment.

So, Paul, I want to turn to you and talk a little bit about executive compensation. We know that this is a challenging season because it is the first experience with all the new disclosure obligations. You are inside counsel to management and to the board. Can you share with us your thoughts on CD&A¹²⁸ and any of the other aspects of the new rules? Do you think we are going to get more valuable information out there to shareholders? Is it going to be worth the hassle to you? Or are we really just going to have a whole brand-new form of boilerplate? And also, this is an opportunity to find out later if the Dean agrees with you.

MR. WASHINGTON: Okay. Let's see. I am all in favor of getting more executive compensation for myself. So we'll see.

MS. GREGORY: That's a good bias to disclose.

MR. WASHINGTON: Actually, let me step back for a second on executive compensation. I think that it, more than anything else, is what is emotionally driving corporate governance reform these days. I just think, no matter what people talk about, really what is at the heart of this emotionally—and I know this is a very analytical kind of legal discussion, but just emotionally—is executive compensation.

I think that the concern over that has evolved considerably, at least the way it is expressed, over the last five years since 2002. You know, for a while the concern about executive compensation was, I think, expressed as “Oh, we’ve got the wrong incentive, stock options; there’s an overemphasis on stock options.” Well, that has been addressed to a large extent, partly through expensing and just through changes in compensation structure.

Another concern expressed about executive compensation was, “We’ve got the wrong process” or “There’s cronyism in it.” I think that has been addressed, if not through the result of the *Disney* decision then through the threat of litigation embodied by *Disney*,¹²⁹ and also by the New York Stock Exchange rules¹³⁰ and so forth. So that concern has

127. *Id.* (“Compared with the six-year standard that prevailed for some two decades, the average stock is now held by the average fund for an average of only 11 months.”).

128. Compensation Discussion and Analysis Rules, Exchange Act Release Nos. 33-8732; 34-54302, 17 C.F.R. 228.402, 229.402 (Sept. 8, 2006).

129. *See Brehm v. Eisner* (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27 (Del. 2006).

130. *See* NYSE, Inc., NYSE Rules 303A (June 30, 2003), *available at*

been addressed.

I think the concern that has also been addressed in the past about not enough disclosure is going to be more than adequately addressed this year. I don't think the new rules are perfect. I think actually some of the stuff that the SEC did at the last hour, right before Christmas—in fact, they describe it as a gift to corporations—I'm not sure it was.¹³¹ It actually makes the summary compensation chart somewhat harder to understand. But I think there is going to be enough out there that the desire for disclosure about compensation should largely be sated.

But that still leaves you with a couple, I think, driving emotional concerns about executive compensation.

One is the concern that there is not a sufficient link between pay and performance. Most people who posit this say: "It's not how much you pay. You can pay someone a whole lot. We just want it to be linked to performance." I'm a little skeptical about that, because I actually think that if we paid people less, the concern about the link with performance would be substantially lessened.

But I think that there will be an ongoing dialogue with shareholders—and we are engaged in it right now—about what it is that we think we mean by performance and what do our investors mean by performance. We may not come to 100 percent agreement with all of them, but we will come to understand what we each mean by performance and how our compensation is linked to it.

The final concern—I don't know if it will be addressed, but I do think that until it is addressed we are going to still see the drive for more governance reforms—is over pay disparity. It's just the concern, especially when you are talking about non-entrepreneurial executives, of how can you possibly justify the 500-times disparity between the lowest-paid worker and the CEO.¹³² How can any individual at a company be worth that much money?

I think the Barney Frank legislation¹³³ and the say-on-pay proposals don't address it directly, but I think it is an attempt to, frankly, instill a

<http://www.nyse.com/pdfs/finalcorpgovrules.pdf>.

131. Executive Compensation Disclosure, Exchange Act Release No. 33-8765, 17 C.F.R. 228.402, 229.402 (Dec. 22, 2006).

132. Harvy Lipman, *Charitable Pay, a Growing Disparity*, BUS. WK., Nov. 18, 2005, available at http://www.businessweek.com/bwdaily/dnflash/nov2005/nf20051118_5196_db_085.htm (last visited Apr. 21, 2007).

133. Frank's "Executive Stock Option Profit Recapture Act" (H.R. 4208), would be inserted into Section 304 of the Sarbanes-Oxley Act.

sense of public shame on boards and on management for paying as much as they do. It's sort of hauling people into the box in the town square and putting them out there and having them pelted with tomatoes and apples and things if they are paying people just too much. I think until that is actually resolved—and I don't know if it will be resolved—that is still going to drive a lot of the press, it is going to drive the activists, it is going to drive the popular appeal for corporate governance reform.

MS. GREGORY: You know, that is an issue that has been out there for a while, and yet I don't believe most boards are yet even talking about that in a compensation philosophy discussion.

MR. WASHINGTON: Right. That's exactly right.

MS. GREGORY: That has been my experience.

Other comments?

MR. ENGLANDER: In terms of executive comp., there is one subtle elevator bias in terms of why is executive comp.—all we do is talk about it and it seems it is still going up.

The first is sort of obvious, but people don't really think about it. That is, if you ask any board of directors, "Is your CEO horrible, terrific, or average?" I don't think you will find a director who says their CEO is horrible. I don't think you will find many directors who say their CEO is average. What's the result? You get the consultants to give you the highest pay and you put them at the high end of the range. There you go. Everybody is terrific, just like everybody is good-looking and funny and all that stuff.

So that's a big problem, because I think there is a tendency—and maybe it is process-based, it's legal-based, it's people trying to protect themselves—to put a great deal of faith, in my opinion far too much faith, in relative analysis. In an objective world, if the people in this room owned the Walt Disney Company, I don't think we would have agreed to give Mike Ovitz \$130 million if he was there for fourteen months. Maybe I'm wrong. But that seems like a lot of money for fourteen months.

But maybe you could figure out: "Okay, what's your job? What are you there to do?" You know, was Bill Gates worth it at Microsoft Corporation?¹³⁴ I think if you bought stock on the IPO, you would say, "Yeah, he was."

134. For more information, please visit the Microsoft website, http://www.microsoft.com/misc/features/features_flshbk.htm (last visited Apr. 21, 2007).

But the problem with that thinking is that: Well, was it the CEO or was it a great business beforehand? In the case of a Microsoft, I think it is a lot clearer. There is an entrepreneur who created enormous wealth, just clear insane value. Really, when you have corporations that could arguably do just fine without that particular CEO, that's where you've got to ask yourself. In the case of the founder entrepreneur, a lot of times they are worth it.

But I think what you can do as a member of a comp. committee is say, "All right, this is what we think is important," and just be very clear about what is creating value, because it is not necessarily "Well, the stock was up 20 percent." Maybe everything was up 20 percent. Maybe par was 30 percent that year. Conversely, maybe the stock was flat but par was down 5 percent.

MS. GREGORY: Thank you.

I think it is time in our program to turn to the audience and see if we have any questions.

The young lady in the back?

QUESTION: I have found this discussion so interesting. I am not a corporate governance specialist, but what I want to do is ask a question and play Devil's Advocate. You all agree that it was much more interesting to be on a board of directors back when you could really focus on the business instead of having to deal with things like over-regulation and SOX.¹³⁵

But here's my question. Boohoo, maybe it takes more time to be a member of a board of directors now than it used to. Why is the answer that the same amount of time is still being spent and some tasks, like running the business, are getting squeezed out?

MS. GREGORY: I just want to start by saying the same amount of time is not being spent. The amount of time that directors and boards are spending is enormous. It has gone up exponentially in my experience.

Panelists, anybody want to take that one on?

MR. CLARK: I wasn't suggesting that it is less interesting and exciting. It is actually very exciting when you are the midst of major litigation or an activist takeover. I mean it's more dramatic. Thinking about long-run industry trends, that can be boring.

My point was it is probably more important for what businesses do. Why has the shift not been rectified yet? I think it is because the

135. Sarbanes-Oxley Act of 2002, 107 P.L. 204, 116 Stat. 745 (2002).

compliance focus was so enormous that it took up a higher percentage, even though boards now meet more often than they used it. It just hasn't gotten in equilibrium yet. I think it will.

MS. GREGORY: More questions?

QUESTION: I have two questions. The first part of it would be: how do you define fiduciary duty in the absence of a shareholder mandate? Then, the second part of the question is: how would you see resolution of conflicts between the directors and major classes of shareholders unfolding, particularly when you have a non-monolithic, non-homogeneous group of investors, and as Justice Jacobs said, possibly hedge funds holding short positions, or CalPERS¹³⁶ engaging in activism? How do you see the resolution of conflicts when the board says, "You know what, this investor group is acting contrary to the interests of the company?"

MR. CLARK: That is really hard. I think that is probably the major frontier for innovative, new scholarship in corporate law in the next decade or so, is to try to address those questions.

One could try to cheat a little bit and say that a board should think of it the way they do in a Chapter 11 reorganization,¹³⁷ which is the company is insolvent, so your residual claimants to whom you owe a fiduciary duty are not just the shareholders but all of the claimants on the estate. So your job as a director is to make a judgment as to what will maximize the value of the firm, the discounted present value of the firm, under various scenarios—selling, reorganizing, restructuring, whatever—and then worry about who gets what chunk of it later.

You could do that in a company, too, when you are faced with demands by particular shareholder groups that might not be faced with others. But I think that is cheating a little bit to try to solve it that way, because sometimes the demand is something like financial structure, have a much bigger buyback program.

In fact, this was Icahn's initial suggestion, I believe, which was you should leverage up because it is tax-efficient; and then buy back a lot of stock, don't keep the money in; and do it by a self-tender offer, which

136. The California Public Employees' Retirement System (CalPERS) provides pension fund, healthcare and other retirement services for approximately 1.5 million California public employees. As of May 2006, it owns \$230 billion worth of stock, bonds, funds, and private equity. It is the largest pension fund in the United States. For more information, please visit the CalPERS website, <http://www.calpers.ca.gov/> (last visited Apr. 21, 2007).

137. 11 U.S.C. § 109 (2005).

would normally give a premium, as opposed to a 10b5-1 trading program, where you buy back stock over a longer period of time and you never lead the market, which is the kind of thing that the institutional investors who want to stay in the company would prefer. They don't want you paying a lot to the people who are leaving, whereas the activists might want that. So there is a conflict.

I think we resolved it in favor of the long-term investors. But is there a fiduciary duty somewhere? Can I point you to a legal authority that says that's how you should resolve it, or do I have a clear theory as to how? No. It is really a hard question.

MS. GREGORY: Paul?

MR. WASHINGTON: I think this is an important area to explore. This goes back to the question about how boards are spending their time, too. I think these are related.

Directors spend a lot of time on monitoring. They should spend even more time, I think, on the business. One thing I am concerned about for them is if they do in fact have a duty to listen, how much are we going to turn our directors into the equivalent of congressmen, where they are representing constituencies; or, even if they're not beholden to a particular constituency, how much of their own time is devoted to listening to shareholders, to meeting with them? You know, congressional offices have huge staffs just to handle the mail from constituencies.

I am concerned just about directors' time and their being able to fulfill the monitoring role, the strategic role, and that sort of ombudsman representative, democratic kind of role. To my mind, this is an area where we really need to have thoughtful, constructive dialogue with major shareholders so that we can reach some sort of understanding and accommodation, because it is not going to be in companies' long-term interests in my view. I think we need to listen to our owners, but it can't be done in a sort of congressional kind of way. I just don't think that that model is going to work for us.

MR. ENGLANDER: Just one other point. We talk about directors' time, but the concept of time in terms of the investor—what's the right time horizon is really at the core of your question. Is it your job as a director to maximize the value of the individual who bought stock at 9:30 in the morning and wants to sell it at 4:00; or, at the same time, are you supposed to maximize a person who bought Coca-Cola stock in 1950 and has it in their vault creaking away somewhere and doesn't even know they have it? Somewhere in there, there is a balance.

You've just got to figure out what is the right thing for most of your shareholders.

I suppose that if everybody in an individual company, in some bizarre case where everybody bought stock yesterday and wants to sell today, that's pretty easy: We'll just get the highest price today and call it a day. But I think that is at the heart. Ownership is so transient—you know, people trade pieces of paper; they don't buy businesses. That's what makes it hard.

MS. GREGORY: Other questions?

QUESTION: I am teaching a seminar on European corporate governance. That suggests a couple of good questions, I think.

Barney Frank and others seem to think that the U.K.'s corporate governance structure, at least in the last ten years, has improved radically and is ahead of us. Specifically, he wants an advisory vote of the shareholders on executive remuneration. That apparently has worked to some degree. I am a shareholder in Glaxo, and we know what happened in Glaxo: the remuneration package was cut in two after the advisory vote.¹³⁸ So I wonder what you think about the value of an advisory vote. Will it work, or is this just useless?

The other, to throw this in from left field, is Norway has adopted a law that will go into effect next year that will require 40 percent of the board to be women.¹³⁹ Spain is considering a similar law.¹⁴⁰ Our percentage of women and minority directors has been frozen since the early 1990s at around 10–12 percent.¹⁴¹ Can we do anything about it? Or maybe shouldn't even think about doing anything and just leave it to the market and hope over time it will change.

MS. GREGORY: Volunteers?

MR. WASHINGTON: I'll do the U.K. one. We'll divvy it up. You know, the white male panel here.

138. *Glaxo Defeated by Shareholders*, BBC NEWS ONLINE, Mar. 19, 2003, <http://news.bbc.co.uk/1/hi/business/3038381.stm> (last visited Apr. 21, 2007).

139. Gladys Fouche and Jill Treanor, *In Norway, a Woman's Place is in the Boardroom*, THE GUARDIAN, Jan. 9, 2006, <http://business.guardian.co.uk/story/0,16781,1682083,00.html> (last visited Apr. 21, 2007).

140. Charles Penty, *Women in Spain Moving from Bulls to Boardroom*, INT'L HERALD TRIB., July 25, 2006, Finance at 14, available at <http://www.iht.com/articles/2006/07/24/bloomberg/bxmacho.php> (last visited Apr. 21, 2007).

141. Diana Bilimoria, *Building the Business Case for Women Corporate Directors*, in WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 26 (Mary C. Mattis & Ronald J. Burke eds., 1997).

On the U.K. one, without getting into all the pros and cons on it, a couple of things about that. You know, the United Kingdom does have a different shareholder base from the United States.¹⁴² They have a different general regulatory regime, as you know, as compared to the United States.¹⁴³ As I understand it, in the United Kingdom the requirement is for companies to allow a shareholder vote on the compensation report, not on the compensation actually.¹⁴⁴

QUESTION: Individual directors.

MR. WASHINGTON: On directors, right, but not on the compensation just itself.

One of the challenges in the United States is when we have this advisory vote on compensation, what are we actually asking people to vote on? Are we asking them to vote on the compensation policy, on the compensation disclosure, or on the compensation itself?

The other thing I understand about the United Kingdom is there is a Deloitte study that came out a couple years ago that actually said it has been helpful in the United Kingdom.¹⁴⁵ But one thing they do in the United Kingdom, as I understand it, is that part of the compensation report, which is what they are being asked to vote on, has forward-looking disclosure. So it says, "Here's what we plan to do with director compensation in the coming year." So you are not just voting on how the compensation was in the past but what the company is planning to do in the future. I can see that being a constructive loop. You hear from your shareholders about what they think about how you are planning generally to pay your folks in the future.

That is not how either the Frank legislation¹⁴⁶ is currently structured or how a lot of the say-on-pay proposals are currently structured. They are not set up to provide the shareholders with a little bit of advance warning and advice to the company on how it might pay in the future. They are much more backward-looking.

142. Marco Becht and J. Bradford DeLong, *Why has there been so little Block Holding in the United States, in A History of Corporate Governance around the World*, 622 (Randall Morck, ed. 2005).

143. *Id.*

144. *Id.*

145. See DELOITTE, REPORT ON THE IMPACT OF THE DIRECTOR'S REMUNERATION REPORT REGULATIONS: A REPORT FOR THE DEPARTMENT OF TRADE AND INDUSTRY (Nov. 2004), http://www.deloitte.com/dtt/cda/doc/content/UK_Tax_Directors_RemunerationReport_2004.pdf (last visited Apr. 22, 2007).

146. See *supra* note 133.

MR. KAMERSCHEN: Regarding Norway, I might as well have a full disclosure here. I am the father of three daughters, so I will start with that.

Obviously, female executives as human beings are intelligent, are bright, they work hard, they have all the attributes that you want. Behind the whole question of diversity is a very pragmatic one. It suggests that boards of directors do not want diversity—that they want to keep it a white male club and that's the way it should be.

All I can tell you is I have been involved in searches over the last five years, and when you try to identify, using outside search firms, et cetera, those characteristics, the pool is abysmally small. I have not figured out why that is. In the last search I did, we actually had keen interest in three women, and all three of the women on reflection said, "You know, I've got my life and I don't want to spend all that time," so therefore next case.

So I think you have to balance the premise. Don't make the assumption that companies don't want that diversity, because it just isn't true.

MS. GREGORY: I am troubled by this whole issue. One of my concerns is I still think that the search firms are not casting a broad and deep enough net. If you want women candidates, you have to think beyond the traditional CEO, because we don't have women CEOs. The search firms still tend to be fairly safe in the kinds of candidates that they tee up.

As for boards wanting diversity, I think boards do. But I think you are still fighting—I'm not quite sure what it is we are fighting. But I am aware of a board where there was one woman on the board and a male director in a discussion about a director search said, "It would be great to have more women on this board," and a director on the board said to him, "We already have one." So there is a tokenism that is still very, very difficult to get through.

I think if women are feeling it, it is also the same in many instances for people of color. These are big issues, and it will be interesting to see when we break through that. At the current rate we are going, we are going to have parity on boards in, I think, about 2050.

With that—I got the last word—I want to thank all of you. I am going to turn this over to Jill. I really enjoyed it. Thank you.

PROF. FISCH: I don't know about you, but the discussion about diversity makes me need a drink. Fortunately, we have some right outside. Please join me and the panel.